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No. 73-5156

In The Supreme Court of The United States

OCTOBER TERM, 1973

WILLIAM J. LEVENTHAL,

Petitioner

v.

FELIX FORTE, ET AL.,

Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF IN OPPOSITION

PETITION NOT PRINTED

ROBERT H. QUINN
Attorney General
WALTER H. MAYO III
Assistant Attorney General
TERENCE P. O'MALLEY
Assistant Attorney General
MARGARET N. ST. CLAIR
Legal Assistant
373 State House
Boston, Mass. 02133

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OPINIONS BELOW

The opinion of the United States District Court is not yet reported; it is set forth in Appendix B to the petition for a writ of certiorari. The order of the United States Court of Appeals for the First Circuit was entered without opinion and is not reported; it is set forth in Appendix A to the petition for a writ of certiorari.

QUESTIONS PRESENTED

1. Whether this action is barred by the Statute of Limitations.

2. Whether Respondents are immune from a civil action for damages.

STATUTORY PROVISIONS INVOLVED

UNITED STATES CODE:

Title 42, § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Title 42, § 1985

. . . (2) If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully

assented to by him, or of his being or having been such juror; or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws;

(3) If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

MASSACHUSETTS GENERAL LAWS:

Chapter 212, § 6

The court shall have original jurisdiction of all crimes, and appellate jurisdiction of crimes tried before a district court. Crimes committed in that part of Scituate described in chapter three hundred and ninety-four of the acts of nineteen hundred and twelve shall be within the territorial jurisdiction of the court both in Norfolk county and in Plymouth county, and arrests and service of process in such cases may be made by an officer qualified to serve criminal process in Cohasset. Crimes committed in any part of Cambridge, Watertown or Newton lying in the Charles river basin shall be within the territorial jurisdiction of the court both in Middlesex county and in Suffolk county.

Chapter 260, §2A:

Except as otherwise provided, actions of tort, actions of contract to recover for personal injuries, and actions of replevin, shall be commenced only within two years next after the cause of action accrues.

Chapter 260, § 12:

If a person liable to a personal action fraudulently conceals the cause of such action from the knowledge of the person entitled to bring it, the period prior to the discovery of his cause of action by the person so entitled shall be excluded in determining the time limited for the commencement of the action.

RULES OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT:

Rule 12:

At any time, on such notice as the court may order, on motion of appelee or sua sponte, the court may dismiss the appeal or other request for relief or affirm and enforce the judgment or order below if the court lacks jurisdiction, or if it shall clearly appear that no substantial question is presented. In case of obvious manifest error the court may, similarly, reverse. Motions for such relief should be promptly filed when the occasion appears, and must be accompanied by four copies of a memorandum or brief.

If the court concludes, after adequate opportunity for briefing, that even though there may be a substantial question, oral argument would not assist it, the Clerk will so advise counsel. No such conclusion will be reached unless the three judges, who will have examined the briefs, are unanimous in so concluding.

STATEMENT

Petitioner brought an action in the United States District Court for the District of Massachusetts under 42 U.S.C. §§ 1983, 1985 (2)(3). The action was against a large number of defendants including several assistant attorneys general of the Commonwealth of Massachusetts, certain partners and associates in the law firm of Choate, Hall & Stewart, some officers, directors, and stockholders of the American Discount Corporation; and two other Respondents, Mr. Justice Forte of the Superior Court of Massachusetts and former Assistant District Attorney Reiser, on whose behalf this brief is filed.

Petitioner was convicted of larceny and other crimes relating to the use of corporate funds of the American Discount Corporation at the conclusion of a trial in the Superior Court of Massachusetts, Mr. Justice Forte presiding, on March 10, 1965 (Complaint p. 9).[1] Petitioner brought suit in the district court alleging that respondents did not comply with certain agreements concluded with the petitioner during the course of the criminal proceedings. The complaint alleges that the petitioner satisfied the demands of the American Discount Corporation as to restitution after trial on the condition that he would receive a suspended sentence (Complaint p. 13, ¶ 25).

Petitioner alleges that he was, nevertheless, tried, temporarily committed, convicted, and sentenced (Complaint pp. 9-11, ¶¶ 13, 15, 16, 17, 22). The complaint also alleges that since the respondent Justice of the Superior Court had written a letter in July, 1930 recommending the admission to the bar of the respondent Palumbo, a witness for the prosecution at the trial in 1965, an "intimate relationship" exists between the two individuals (Complaint p. 14, ¶ 29). With respect to the respondent, former Assistant District Attorney Reiser, the complaint alleges that he initially informed the petitioner in 1963 of possible prosecution and later informed him in 1969 of possible prosecution of the remaining indictments (Complaint pp. 7, 13-14; ¶¶ 8, 27).

ARGUMENT

THE PETITION PRESENTS NO SUBSTANTIAL QUESTION WARRANTING FURTHER REVIEW BY THIS COURT. THE DECISION OF THE DISTRICT

[1] A copy of the complaint is attached to the petition as the first part of Appendix C.

COURT—WHICH IS SUPPORTED BY A CAREFULLY REASONED OPINION, AFFIRMED BY THE COURT OF APPEALS—IS CORRECT.

A. Even Accepting All Well-Pleaded Facts In The Complaint as True, The Statute of Limitations Bars This Suit

Congress has not enacted a statute of limitations applicable to suits arising under the Civil Rights Act of 1871, 42 U.S.C. § 1983 and § 1985. Therefore, federal courts apply the limitation period of the state. *O'Sullivan* v. *Felix*, 233 U.S. 318; see also *Madison* v. *Wood*, 410 F.2d 564 (6th Cir. 1969); *Francis* v. *Lyman*, 108 F.Supp. 884, 885 (D. Mass. 1952); *Almond* v. *Kent*, 459 F.2d 200 (4th Cir. 1972). Massachusetts has not enacted a statute which is made applicable specifically to § 1983 or § 1985 suits. The lower court was correct in applying the general state statute of limitations to this action, Mass. G.L. c. 260.

Petitioner alleges (Complaint pp. 14-15) that he was "deprived both of property and personal liberty and freedom and suffered injury to his personal reputation and great mental anguish." The District Court properly held that this is an action sounding in tort. As such, Mass. G.L. c. 260, § 2A mandates a two-year period of limitations. The wrongful acts complained of are alleged to have been committed by respondents Forte and Reiser in 1965 during criminal proceedings against petitioner. The instant suit was originally brought in the District Court in 1972, by which time the two-year period had expired. The action was therefore barred by the statute of limitations.

Petitioner claims that Mass. G.L. c. 260, § 12, *Extention of time in case of fraudulent concealment*, should be the applicable statute. Accepting the well-pleaded facts as true, no fradulent concealment has been demonstrated. In the complaint (p. 14, ¶ 29) it is alleged that:

> "On September 28, 1970, the Plaintiff Leventhal discovered the existence of an intimate relationship between the Defendant Felix Forte, the presiding Justice at his criminal trial, and the Defendant Frank Palumbo, president, director and stockholder of American Discount Corporation and who was an important witness for the prosecution against Leventhal. (See Exhibit 'A' annexed and attached hereto.)"

An affirmative act of concealment is necessary for the Massachusetts statute to apply; none has been alleged here. *Falk* v. *Levine*, 66 F.Supp. 700 (D. Mass. 1946); *Janigan* v. *Taylor*, 344 F.2d 781 (1st Cir. 1965), *cert. denied*, 382 U.S. 879; *Federal Ins. Co.* v. *Summers*, 330 F.Supp. 1041 (D. Mass. 1970). Moreover, Exhibit "A" to the complaint indicates that in fact all the evidence involved has been a matter of public record since 1930. In *Walker* v. *Soule*, 138 Mass. 570 (1885), an administrator made false representations as to his ability to transfer good title to land. The action was begun more than twenty years after the cause of action accrued, but within six years after its discovery by the plaintiff. The court stated:

> "The only false representations were as to the contents of public records, which the plaintiff had full opportunity to examine. If such representations constitute a cause of action, they are not sufficient to prove a subsequent fraudulent concealment of it from the

knowledge of the plaintiff. *Nudd* v. *Hamblin*, 8 Allen, 130." *Walker*, *supra*, at 572.

See also, *Tracerlab, Inc.* v. *Indus. Nucleonics Corp.*, 204 F.Supp. 101, *rev'd on other grounds*, 313 F.2d 97 (1st Cir. 1963).

Petitioner has neither shown any active concealment of the underlying facts nor given any indication that he was unable to discover the pertinent facts. It is, therefore, inappropriate to apply Massachusetts G.L. c. 260 § 12, *Extention of time in case of fraudulent concealment*, as a tolling statute. The tort statute of limitations, Mass. G.L. c. 260 § 2A, controls and bars this suit.

B. The Doctrine of Judicial Immunity Renders the Respondents, Justice of the Superior Court and (Former) Assistant District Attorney, Immune From A Suit for Damages Under 42 U.S.C. §§ 1983, 1985.

Petitioner's suit for damages against the Superior Court Justice and former Assistant District Attorney is based on the Civil Rights Act of 1871, 42 U.S.C. §§ 1983, 1985. Since *Bradley* v. *Fisher*, 13 Wall. 335, it has been firmly established that a judge with general jurisdiction over the subject matter of a case cannot be civilly liable for acts done in the exercise of his judicial function. In *Pierson* v. *Ray*, 386 U.S. 547, 554, the Court squarely held that 42 U.S.C. § 1983 did not abolish this doctrine of judicial immunity.

Mr. Justice Forte was exercising his judicial function at all times referred to in the complaint. As a Superior Court Judge, he properly presided over the petitioner's trial on criminal indictments, committed him for temporary observa-

tion at a mental health institution, and sentenced him to the Massachusetts Correctional Institution at Walpole, Mass. G.L. c. 212, §6. The Judge's alleged statements concerning possible restitution are not *per se* a departure from the judicial role, see *Palermo* v. *Rockefeller*, 323 F.Supp. 478 (S.D.N.Y. 1971). Petitioner's allegations of an "intimate relationship" between Respondents Forte and Palumbo do not preclude judicial immunity. In *Pierson* v. *Ray*, *supra*, at 554, this Court stated:

> "This immunity applies even when the judge is accused of acting maliciously and corruptly. . . It is a judge's duty to decide all cases within his jurisdiction that are brought before him, including controversial cases that arouse the most intense feelings in the litigants. His errors may be corrected on appeal, but he should not have to fear that unsatisfied litigants may hound him with litigation charging malice or corruption. Imposing such a burden on judges would contribute not to principled and fearless decision-making but to intimidation."

The bare allegations of a conspiracy under 42 U.S.C. § 1985 as they appear in the complaint do not overcome the judicial immunity doctrine. Federal courts have uniformly held that judges are immune from damage suits based on 42 U.S.C. § 1985. *Dunn* v. *Gazzola*, 216 F.2d 709 (1st Cir. 1954); *Gay* v. *Heller*, 252 F.2d 313 (5th Cir. 1958); *Hurlburt* v. *Graham*, 323 F.2d 723 (6th Cir. 1963); *Jennings* v. *Nester*, 217 F.2d 153 (7th Cir. 1954); *Aguew* v. *Moody*, 330 F.2d 868 (9th Cir. 1964); *Kostal* v. *Stoner*, 292 F.2d 492 (10th Cir. 1961); *Link* v. *Greyhound Corporation*, 288 F.Supp. 898 (E.D. Mich. 1968).

Respondent Reiser, a former Assistant District Attorney, is also protected from this type of damage action. The immunity doctrine extends to a prosecuting attorney when exercising his function as an officer of the court. *Fanale* v. *Shechy*, 385 F.2d 866 (2nd Cir. 1967); *United States ex rel. Rauch* v. *Deutsch*, 456 F.2d 1301 (3d Cir. 1972); *Gabbard* v. *Rose*, 359 F.2d 182 (6th Cir. 1966); *Arensman* v. *Brown*, 430 F.2d 190 (7th Cir. 1970); *Ney* v. *California*, 439 F.2d 1285 (9th Cir. 1971); *Kostal* v. *Stoner*, *supra*. In *Bauers* v. *Heisel*, 361 F.2d 581, 589-590 (3rd Cir. 1966) the Court stated:

> "[W]e believe that both reason and precedent require that a prosecuting attorney should be granted the same immunity as is afforded members of the judiciary. The reasons are clear: his primary responsibility is essentially judicial—the prosecuting of the guilty and the protection of the innocent, (citation omitted); his office is vested with a vast quantum of discretion which is necessary for the vindication of the public interest. In this respect, it is imperative that he enjoy the same freedom and independence of action as that which is accorded members of the bench."

Petitioner's only claim against Respondent Reiser (Complaint p. 13-14, ¶ 27) alleges that the former Assistant District Attorney discussed with him the possibility of future prosecutions on indictments already returned by the Grand Jury. Such actions were clearly within the scope of his official capacity as an officer of the court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

ROBERT H. QUINN
Attorney General
WALTER H. MAYO III
Assistant Attorney General
TERENCE P. O'MALLEY
Assistant Attorney General
MARGARET N. ST. CLAIR
Legal Assistant

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